

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

93-107 /

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| In re Applications of |) | MM Docket No. 93- |
| DAVID A. RINGER |) | File No. BPH-911230MA |
| ASF BROADCASTING CORPORATION |) | File No. BPH-911230MB |
| WILBURN INDUSTRIES, INC. |) | File No. BPH-911230MC |
| SHELLEE F. DAVIS |) | File No. BPH-911231MA |
| OHIO RADIO ASSOCIATES, INC. |) | File No. BPH-911231MC |

For Construction Permit
For New FM Radio Station at
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

**OPPOSITION TO
MOTION TO ENLARGE ISSUES**

Wilburn Industries, Inc. ("Wilburn"), by its attorneys,
hereby submits its Opposition to the "Motion to Enlarge Issues"
filed by Ohio Radio Associates, Inc. ("ORA") on August 23, 1993,
stating in support thereof as follows:

Introduction

In its Motion, ORA argues that a financial issue and an "EEO
abuse of process" issue should be specified against Wilburn in
this proceeding. As will be shown below, however, no financial
issue should be specified in the circumstances of this case, and

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there is no basis in law, logic or Commission policy for ORA's proposed "EEO abuse of process" issue.

The Financial Issue

A. ORA's Motion. ORA contends that a financial issue must be specified against Wilburn because a written budget allegedly was not prepared by Wilburn's principals until May, 1993, and they did not prepare personal financial statements until the end of January, 1992, approximately one month after executing their application.

B. Wilburn's Financial Qualifications. As explained in Wilburn's September 3, 1993 Opposition to a similar motion to enlarge filed against Wilburn by Shellee F. Davis, the evidence developed in the course of discovery has demonstrated that Wilburn's principals took a number of serious and substantial steps to establish that they were financially qualified before they executed and filed their application for permit. That evidence, which need not be repeated in detail, showed that Charles Wilburn ascertained that all of the property previously used in the operations of WBBY-FM, including real estate, technical equipment and office furniture, would be made available to Wilburn should it receive a permit from the Commission. Mr. Wilburn also learned the cost of leasing such property from Mid-Ohio Communications, Inc., the former WBBY-FM licensee, and what

it had cost per month to operate the station with those facilities. With regard to the latter figure, Mr. Wilburn did not simply adopt it as his own estimate. Rather, he considered it in light of his own plans and experience and revised it upward accordingly.

Once Charles Wilburn had determined the overall cost of acquiring and operating the station for three months, he wrote a memorandum to his son, partner and co-investor, Bernard Wilburn, providing his estimates and explaining their basis.¹ After the Wilburns were satisfied that they had accurately estimated their costs of construction and operation and that they had the personal financial resources to meet such costs, they executed and filed their application. About one month later, they provided personal financial statements to Carl Fry, Mid-Ohio's representative, who required that they establish their financial qualifications within 60 days of receiving his December 24, 1991 letter concerning the availability of the WBBY-FM facilities.

¹ ORA's pleading does not mention this memorandum, nor does it attach both page 47 and page 48 of Charles Wilburn's deposition testimony, which reveal that Charles Wilburn had drafted two documents containing his cost estimates, one at the time he spoke to Ardeth Frizzell in 1991 and another when he spoke to Terry Wilson in 1993. See Attachments A and B hereto. As explained in Wilburn's Opposition to Davis's Motion to Enlarge, Charles Wilburn did not correctly recall the date of his initial memorandum at his deposition, but promptly provided copies to the other applicants after the deposition.

C. Argument. The information learned in discovery establishes the following: (1) Charles Wilburn undertook a serious, good faith effort to determine the construction and initial operating costs of his proposed station; (2) those costs are reasonable and unchallenged by any party (except for two strained arguments disposed of in Wilburn's opposition to Davis's Motion); (3) Charles Wilburn drafted a memorandum identifying and explaining these expenses; (4) the Wilburns were aware of their own financial positions and determined that they could satisfy the expenses which had been budgeted by Charles Wilburn; (5) their ability to meet those costs is unchallenged by any party; and (6) when called upon by Mid-Ohio to demonstrate their financial qualifications, they promptly produced and provided personal balance sheets, shortly after they filed their application and before any party requested such documents in discovery. The sole question presented by ORA's Motion therefore is whether, at this point and in these circumstances, the Wilburns may be found unqualified to receive a broadcast construction permit, solely due to a technical misstep of timing.

The Commission has previously resolved this matter by plainly indicating that a disqualifying issue should not be added in such circumstances. Specifically, it has ruled that a post-designation financial issue will be added if -- and only if -- there is a showing of misrepresentation or of a material, decisionally-significant error which makes it impossible for the

Commission to reasonably rely on the applicant's cost estimates and/or claim that funds will be available to meet such costs. Revised Proceeding of Broadcast Applications, 72 FCC 2d 202, 222, 45 RR 2D 1220, 1235 (1979). Lack of certain documentation may well (and usually does) raise a question whether such misrepresentation or material error has occurred, but it does not necessarily raise such a question in every instance.² Indeed, where an applicant has shown that it is fully qualified to construct and operate a station, absolutely no purpose or policy would be served by an issue which concerns only the date on which an otherwise reliable, essentially contemporaneous document was drafted.

In this regard, while Commission policy concerning the availability of documents has evolved since Revised Processing of Broadcast Applications, supra,³ its 1981 and 1989 policy statements -- like its 1979 statement -- stressed that it was not

² That is, issues will be added where, for example, an applicant lacking a budget failed to ascertain the cost of operating its proposed facility, where an applicant neglected to include the price of a directional antenna in his cost estimates, where an applicant relied on financing from a third party whose actual financial position was unknown, or where an applicant obtained an accommodation letter which provided her with no true assurance of a future bank loan. In such instances, the lack of appropriate documentation establishes the underlying lack of financial qualifications and so requires an issue.

³ See, Revision of FCC Form 301, 50 RR 2d 381 (1981); Revision of FCC Form 301, 4 FCC Rcd 3853, 66 RR 2d 519 (1989).

changing the basic criteria for determining an applicant's financial qualifications and, thus, the basic criteria for adding post-designation issues. That is, the Commission has repeatedly modified its policy concerning documentation in order to discourage fraudulent and/or speculative applications, and to uncover and eliminate frivolous or otherwise unqualified entrants. See, Revision of Form 301, 50 RR 2d at 382; Revision of Form 301, 66 RR 2d at 528-530. None of these changes, however, was designed to enable litigious applicants to "flyspeck" the applications of their competitors, or to disqualify otherwise financially qualified parties. While the more recent of these procedural requirements have indeed helped the Commission weed out unqualified applicants, it would be erroneous and contrary to well-established Commission policy to hold a hearing in this case, where no question about an applicant's cost estimates or ability to meet those estimated costs has been raised.

In short, the Commission reasonably requires that applicants take the steps necessary to ascertain their costs and establish that they can meet such costs before requesting a construction permit from the Commission. The Commission also has designed procedures to ensure that applicants undertake such steps and then be able to prove that they have done so. Where such procedures were not followed, or where an applicant cannot document that it did what was required, then financial issues may

be added and such applicants may be disqualified. Where, however, an applicant such as Wilburn has undertaken the appropriate steps and has documented that it has done so, the slightly belated drafting of a document -- which supports the conclusion that Wilburn is financially qualified -- cannot appropriately be used to disqualify that applicant. ORA's Motion, which elevates form over substance and totally ignores the basic question of whether Wilburn actually is financially qualified, therefore should be denied.

The "EEO Abuse of Process" Issue

A. ORA's Motion. ORA contends that an "EEO abuse of process" issue should be specified against Wilburn in this proceeding because Wilburn: (1) did not submit an EEO program at the time it initially filed its application and (2) used information contained in the EEO programs of the other applicants when completing its own EEO program. According to ORA, such a "cavalier disregard for the Commission's filing requirements and for its EEO policies constitutes an egregious abuse of process".

B. Argument. ORA's argument is patently frivolous. Wilburn's principals reasonably chose not to submit an EEO program with their application until they were sure of what they were doing and, as recognized by the Commission staff, the omission of an EEO program does not render an application

unacceptable for filing. Indeed, the filing of a later amendment to include an EEO program was entirely consistent with the Commission's filing requirements.

Further, there is nothing particularly unique about any applicant's EEO program: The FCC has drafted the multi-page model, and applicants merely fill in the blanks, listing minority and female organizations, schools with significant minority or female populations, and media with significant circulation among local minority and female residents. Local groups, such as the local NAACP chapter mentioned in the Wilburn depositions, may be listed by several applicants, and there is no special merit or magic in conducting "independent research" in the Yellow Pages or at the Chamber of Commerce to determine what groups, schools or media may exist in a certain area. What concerns the Commission is the applicant's awareness of such recruitment sources and its actual use of such sources when it seeks to fill positions on its staff.

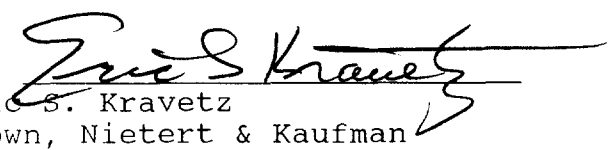
Wilburn's EEO program demonstrates that it is aware of local groups, schools and media, regardless of how Wilburn may have gone about identifying them for its model EEO program. Moreover, absolutely no question has been raised about Wilburn's willingness to contact such groups, schools and media once it receives a permit and begins to assemble a staff. There thus is no basis for ORA's claim that Wilburn has disregarded the

Commission's EEO policy in the past or will disregard such policies in the future. Simply put, ORA's strident effort to tar Wilburn's character is entirely groundless: Wilburn has done nothing improper, and ORA's fatuous rhetoric does not support the issue it seeks to invent.

Conclusion

ORA's Motion is a prime example of how a litigious applicant with absolutely no comparative attributes can frustrate the orderly and expeditious conduct of a hearing through time-consuming, financially-burdensome and entirely wasteful pleading wars. Its Motion should be promptly denied in all respects.

Respectfully submitted,
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September 8, 1993

1 Q I understand that. Just above the
2 signatures of you and Bernard there is --

3 A We printed our name.

4 Q -- printed -- did you print your name?

5 A Yes, and Bernard printed his own.

6 Q Fine. And there is a date which says
7 December 27th, 1991. Is that --

8 A Actually they both look like my writing.

9 Q They are both your writing?

10 A Yes, they both look like my writing. The
11 printing is each of ours.

12 Q Now, I was confused regarding whether a
13 budget for operation of the station had been prepared
14 prior to the application being filed. Had one been
15 prepared by Wilburn Industries or you and Bernard?

16 A Well, I -- yeah, I sort of prepared it in
17 my head the first time I ever talked to Ms. Frizzell
18 about it, about what it would take to operate the
19 place, yes.

20 Q Did you ever reduce that to writing?

21 A Yes, we reduced it to writing.

22 Q When did you reduce it to writing?

12/24/91

Attachment B

Denard —

I went to Westville today and
visited the WBSX studios - also went
to Simsbury and saw the town site.
I talked to the Gen Mgr. (an architect Fingzell)
She told me the present owner will lease
all the equipment to us for \$6,000/mo.
(see ltr I got from Atty Carl Ray).
She also told me the current
operating costs were \$30,000/mo —
they have 17-18 employees. This
sounds a little low to me —
I think we should figure on \$30,000/mo
for payroll for 18 people. This plus
the lease of \$6,000/mo, then we would
have royalties and utilities and other
expenses probably of about \$10,000 —
altogether about \$46,000/mo. We
should estimate \$50,000/mo for
operating costs on our application.
I didn't have time to look at
the engineering info — as soon
as you get back go see
Ms Fingzell about this — all
the papers are at the studio
and we need them for the application.
Dad

CERTIFICATE OF SERVICE

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 8th day of September, 1993, I caused copies of the foregoing "Opposition to Motion to Enlarge Issues" to be delivered by first class mail, postage prepaid, to the person named below:

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